92-1840

CASE NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

PATRICIA TORVIK

and

STEPHANIE TUBBS JONES,

Petitioners,

vs.

MICHAEL G. LEVINE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER A STATE COURT TRIER OF FACT CAN RATIONALLY DETERMINE THAT AN INSANITY ACQUITTEE IS SUBJECT TO CONTINUED CONFINEMENT BASED ON EXPERT TESTIMONY THAT THE PERSON HAS AN INCURABLE MENTAL ILLNESS, EVEN WHEN THE SYMPTOMS OF SUCH MENTAL ILLNESS MAY BE IN REMISSION.

II. WHETHER A STATE COURT FINDING OF PRESENT MENTAL ILLNESS IS A QUESTION OF FACT WHICH IS ENTITLED TO A PRESUMPTION OF CORRECTNESS.

III. WHETHER A STATE COURT OF APPEALS' RELIANCE ON WAIVER AS ONE GROUND FOR DENIAL OF RELIEF IS A PROCEDURAL BAR TO FEDERAL HABEAS CORPUS REVIEW OF CONSTITUTIONAL SUFFICIENCY OF THE EVIDENCE.

IV. WHETHER AN "ACTUAL SANITY" EXCEPTION EXCUSES PROCEDURAL DEFAULT OF A SUFFICIENCY OF THE EVIDENCE CHALLENGE BY AN INSANITY ACQUITTEE TO CONTINUED CONFINEMENT, WHEN THE PERSON MAY STILL SEEK RELEASE IN PERIODIC STATE COURT REVIEW PROCEEDINGS.

V. WHETHER IT IS HARMLESS ERROR FOR A FEDERAL COURT IN REVIEWING THE SUFFICIENCY OF A 1988 STATE COMMITMENT ORDER TO REVIEW AND RELY UPON LATER PSYCHIATRIC REPORTS NEITHER PRESENTED TO NOR CONSIDERED BY THE STATE TRIAL COURT FINDER OF FACT.

PARTIES

The petitioners are Patricia Torvik, who maintains custody of respondent in her capacity as Superintendent of the Dayton Forensic Center, and Stephanie Tubbs Jones, Prosecuting Attorney of Cuyahoga County, Ohio. The respondent is Michael G. Levine, an insanity acquittee, whose commitment at Dayton Forensic Center was ordered continued in July, 1988 by the Court of Common Pleas of Cuyahoga County.

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The March 1, 1993 decision of the United States Court of Appeals for the Sixth Circuit, as corrected April 12, 1993, is reported as *Levine v. Torvik*, 986 F.2d 1506 (6th Cir. 1993). (A-1). The June 25, 1992 judgment of the United States District Court for the Southern District of Ohio, Western Division in Case No. C-3-85-493 is unpublished and unreported. (A-26). The June 25, 1992 final decision of the district court is also unpublished and unreported. (A-27). The July 31, 1991 preliminary decision of the district court is unpublished and unreported as well. (A-34). The magistrate's final report and recommendation of June 29, 1990 is unpublished and unreported. (A-38).

The June 13, 1990 order of the Supreme Court of Ohio denying leave to appeal in Case No. 90-415 is unpublished and is reported as *State v. Levine*, 52 Ohio St. 3d 701, 556 N.E.2d 525 (1990). (A-56). The January 25, 1990 decision of the Court of Appeals of Cuyahoga County, Ohio, Eighth Appellate District in Case No. 56203 is unpublished and unreported. (A-57). The July 11, 1988 judgment of the Court of Common Pleas of Cuyahoga County in Case No. CR-047714 is unpublished and unreported. (A-81). The bench opinion of the Court of Common Pleas in Case No. CR-047714 is unpublished and unreported. (A-82).

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was rendered on March 1, 1993. (A-1).

A petition for rehearing was timely filed on March 4, 1993. On April 14, 1993 the United States Court of Appeals for the Sixth Circuit issued an order denying rehearing and granting a stay of the mandate for 30 days beyond the seven-day period automatically allowed by Fed. R. App. P. 41(a). (A-86).

Jurisdiction is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

This case involves Section 1 of Amendment XIV of the Constitution of the United States which states in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

and 28 U.S.C. §2254(d) which provides:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or any officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

This case also involves Ohio Revised Code §§5122.01(A) and (B) and 5122.15(H) (Page's 1992 Supp.). These statutes are reproduced in the appendix to the petition as A-88-89.

STATEMENT OF THE CASE

This case involves a decision by the United States Court of Appeals for the Sixth Circuit affirming a grant of writ of habeas corpus to Michael Levine on the ground that no rational trier of fact — in this case the state courts — could have found sufficient evidence to continue confinement of this insanity acquittee. The history of Levine's case is as follows.

On May 1, 1979 Levine and an accomplice, disguised as police officers, gained entry into the apartment of Julius and Georgene Kravitz, a prominent Cleveland couple, with the intention of extorting money for a business venture concocted by Levine. At gunpoint they ordered Kravitz to make phone calls to obtain cash. The couple was forced from their home and taken in their own car to a motel. They were then driven around for a period of time during which Kravitz was again ordered to make phone calls to obtain the ransom. In conversation, Levine believed that Kravitz was being critical of the lack of planning behind his (Levine's) kidnapping and extortion scheme. Levine shot Mr. Kravitz three times. Levine then shot Mrs. Kravitz three times as well. Mrs. Kravitz was somehow able to open the door and roll out of the car, and was found by the side of the road a short time later.

Levine and his accomplice, with Mr. Kravitz mortally wounded on the floor of the back seat, drove on. One-half hour later the abandoned car was found with Mr. Kravitz inside pleading for help. Mr. Kravitz died the next morning as a result of the gunshot wounds. Mrs. Kravitz was hospitalized for three weeks, but did recover.

Levine was indicted in Cuyahoga County for kidnapping, burglary, extortion, murder and attempted murder. On September 26, 1979 the Honorable John L. Angelotta, after a bench trial, found Levine to be not guilty by reason of insanity on all charges. Subsequently, Judge Angelotta determined Levine to be mentally ill subject to court ordered hospitalization and ordered his commitment to the state

mental hospital. Levine has remained hospitalized until the present.

Levine's formal history of mental illness dates as far back as 1966. Levine had stolen a checkbook, made purchases and then put the remainder of the money in his own account. He was arrested, spent a few days in jail, and then was admitted to the psychiatric unit of St. Vincent Charity Hospital in Cleveland. Levine was diagnosed as "schizophrenic reaction, schizoaffective disorder, improved, explosive personality."

In 1973 Levine consulted a psychiatrist, Dr. Levendula, who ended up treating Levine from 1973 until the killing in 1979. Dr. Levendula was consulted because Levine was apprehensive, extremely worried that he might do damage to somebody and was afraid that he might kill someone. During the early years of treatment, Levine confided that he wanted to kill some unidentified 25-26 year old woman. Dr. Levendula testified that he truly believed Levine might murder someone.

At Dr. Levendula's recommendation, Levine admitted himself to the psychiatric unit of Mt. Sinai Hospital in Cleveland in October, 1974. Levine was treated and diagnosed as "manic depressive psychosis, explosive personality." Dr. Levendula testified that even after this hospitalization, Levine still had a tremendous homicidal urge to kill an unspecified woman.

During the same time period, Levine, in what Dr. Levendula described as a killing rage, came very close to assaulting a truck driver because of $14.00 worth of damage to a curb in front of Levine's house.

In 1975 Dr. Levendula became aware of Levine's involvement in a highly illegal act. Levine threatened to kill Dr. Levendula's wife and daughter if he revealed Levine's plan, and Dr. Levendula was so terrified that he himself had to be hospitalized. Dr. Levendula was still terrified some four

years later, refusing even to identify Levine's illegal activity at the 1979 trial.

Levine was also physically abusive of his wife, throwing her out of the car, forcing her to walk home, beating her up and breaking her nose, assaulting her by grabbing and squeezing her mouth, tearing off her eyeglasses, and shooting the tires of his wife's car while it was parked in the garage.

Just one week before the killing of Mr. Kravitz, Dr. Levendula felt that Levine's condition was improved and Dr. Levendula felt he had achieved a "therapeutic triumph," that "Levine [had] left his inner psychosis and became one of us." One week later, Levine shot Julius and Georgene Kravitz.

Dr. Levendula testified that he was startled by Levine's reaction to the shooting — Levine didn't feel anything, he had no remorse, it was just like shooting a side of beef. Dr. Levendula, in the 1979 trial, asserted that the killing was the result of Levine's psychosis.

Also at the 1979 trial, Dr. Tanay, Levine's own witness, testified that Levine was psychotic since as far back as 1966 and that every examiner between 1966 and the trial in 1979 diagnosed Levine as psychotic. In a subsequent commitment hearing, Dr. Tanay reiterated his diagnosis of "paranoid schizophrenia or paranoid psychosis, but far-spread schizophrenia to be specific." Dr. Tanay further testified that Levine's illness was incurable. Dr. Tanay noted the significant distinction between mental illness being in remission and being cured.

Dr. Miller, a psychiatrist, who also testified in a commitment hearing subsequent to the 1979 trial, concurred with Dr. Tanay's assessment that Levine was incurable, describing his mental illness as a chronic, progressive lifelong illness. Dr. Miller predicted that there would be some remission of symptoms while Levine was institutionalized, but that a return

to the stresses of the real world would likely result in deterioration to overt psychosis. He noted that remission is not a cure.

Ohio statutes provide that a person found not guilty by reason of insanity is entitled to periodic hearings at the expiration of the first ninety day commitment period and at least every two years thereafter. Following Levine's initial commitment in 1979, Levine had a full hearing in probate court in November, 1979, and a mandatory 90 day hearing, also in probate court, in April, 1980. All subsequent hearings were held in Cuyahoga County Court of Common Pleas before Judge Angelotta. Hearings were held before Judge Angelotta in 1980 and in 1982 and Levine's release was denied.

In December, 1983 Levine's mandatory hearing was held before Judge Angelotta. The court concluded that Levine was mentally ill and subject to continued hospitalization. Levine appealed and the trial court's decision was affirmed through the Ohio appellate court proceedings.

Levine filed a federal petition for a writ of habeas corpus in June, 1985 challenging his 1983 commitment.

In 1988 the magistrate concluded that there was sufficient evidence to support Levine's 1983 commitment, but that there was not sufficient evidence to order him confined to a maximum security facility.[1] The United States Court of Appeals for the Sixth Circuit vacated that decision on the ground that consent to the magistrate had been improperly urged upon the parties. On remand, in July 1988, the magistrate recommended that the district court adopt the magistrate's earlier decision as the district court's findings of fact and conclusions of law.

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[1] It is significant that the evidence supporting the 1983 commitment, which the magistrate found to be sufficient, was similar to the evidence presented to the state courts in 1988, which the district court and Sixth Circuit found to be insufficient to support that commitment.

One week later, also in July, 1988, the state trial court conducted a mandatory hearing and ordered Levine recommitted.[2] (A-81).

This recommitment was affirmed in the state court of appeals (A-57) and the Ohio Supreme Court denied further review. (A-56).

Following the 1988 recommitment, the magistrate concluded that the issues presented by the 1983 commitment were moot and withdrew his earlier recommendation.

In June, 1990 the magistrate recommended that the district court issue a writ finding that there was insufficient evidence in 1988 to conclude that Levine was mentally ill. (A-38).

The district court concurred with the magistrate. By order dated June 25, 1992, the court ordered Levine's release, subject however, to five conditions: 1) Levine should reside in a different county, away from the victim's family; 2) follow-up every two weeks at a community mental health center or by a private psychiatrist or psychologist; 3) the court must be notified in case of Levine's failure to attend his appointments without excuse; 4) the mental health care provider must provide written progress reports to the court; and 5) in case of any signs of deterioration in Levine's mental condition, immediate rehospitalization should be pursued and the court informed within 24 hours. (A-26,27).

On March 1, 1993 the Sixth Circuit affirmed the district court's grant of a writ of habeas corpus conditionally releasing Levine from the custody of the State of Ohio. (A-1). The court found a violation of the Fourteenth Amendment, holding that the evidence was insufficient for a rational trier of fact to find that Levine was mentally ill. A petition for rehearing was denied on April 14, 1993. (A-86).

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[2] Levine waived his state court hearings in 1985, 1987, and 1990.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

I. THE COURT SHOULD GRANT CERTIORARI TO SUSTAIN A STATE COURT ORDER FOR THE CONTINUED CONFINEMENT OF AN INSANITY ACQUITTEE.

(A) This Case Provides An Example Of The Social Costs Of Federal Habeas Corpus Review.

In *Wright v. West*, 505 U.S. ___, 112 S.Ct. 2482, 120 L.Ed.2d 225, 239 (1992), this Court recounted the social costs associated with the writ of habeas corpus — lack of finality, intrusion on state sovereignty, and disturbance of federal-state comity. This case illustrates those costs. The state courts found sufficient evidence to support Levine's continued commitment; the federal courts did not. The state courts specifically found as fact Levine's present mental illness; the federal courts did not. The state appellate court found waiver of the federal constitutional claim; the federal courts did not. The issues presented to the Court in *Wright v. West, supra*, are presented again, this time in the context of a continued confinement of one originally found not guilty by reason of insanity.

In fact, this case appears more compelling for review than *Wright*. In *Wright*, the Court reviewed the constitutional sufficiency of the evidence in a criminal case. This Court has recognized how much more difficult psychiatric diagnosis is compared to the application of criminal law standards. *Addington v. Texas*, 441 U.S. 418, 430 (1979). The risk to society of error in deciding not to make a commitment is potentially acute, particularly where an insanity acquittee has a record of violent acts. Ohio, like the other states, has primary responsibility for protecting society from dangerous mentally ill persons. Yet the court below abrogated the primary role of the state courts in factfinding, in interpreting and in applying their own law, and in validating their procedural rules.

This Court has never specifically addressed the constitutional sufficiency of the evidence in the context of the continued confinement of an insanity acquittee. This case is not like *Foucha v. Louisiana*, 504 U.S. ___, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992), where the government sought to continue the hospitalization of an insanity acquittee on the sole ground that he posed a continuing danger to himself and to society. Nor does it resemble *O'Connor v. Donaldson*, 422 U.S. 563 (1975), where the government attempted to maintain the confinement of a harmless mentally ill person. In contrast, Ohio seeks to continue Levine's commitment because, after full and fair hearings, the state courts determined that he is still mentally ill and dangerous. The same trial court judge who found Levine not guilty by reason of insanity in 1979, who committed him immediately thereafter, and who presided over subsequent recommitment hearings, found — based on the entire record — that Levine was mentally ill and dangerous. This determination was affirmed by the state court of appeals in an extensive decision, a decision which the Ohio Supreme Court declined to review.

(B) This Court's Decision In *Jackson v. Virginia* Requires That Respect Be Given To State Court Applications Of Their Own Law.

In *Jackson v. Virginia*, 443 U.S. 307 (1979), this Court announced a constitutional standard for reviewing sufficiency of the evidence claims — whether a rational trier of fact had a sufficient evidentiary basis to reach the conclusion that it did. This standard has been held to be one of *de novo* review. Yet *de novo* review does not mean that the state courts' application of their own law is entitled to no deference or respect. *Jackson* itself counsels otherwise and instructs federal habeas corpus courts to give deference to state appellate court judgments rejecting a challenge to the sufficiency of the evidence. *Id.* at 323. Indeed, in his concurring opinion in *Jackson*, Justice Stevens emphasized that "[s]tate judges are more familiar with the elements of state offenses than are federal judges and should be better

able to evaluate sufficiency claims." *Id.* at 336 n.9. The *Jackson* standard itself purports to preserve the factfinder's role as weigher of the evidence by mandating that "*all of the evidence* is to be considered in the light most favorable to the prosecution." (footnote omitted) *Id.* at 319 (emphasis in original). And to guard against unwarranted intrusion of state sovereignty, this Court specifically noted that the *Jackson* standard must be applied "with explicit reference to the substantive elements . . . as defined by state law." *Id.* at 324 n.16.

As in *Wright v. West*, the court below purported to apply the *Jackson* standard, with a modification in the burden of proof due to the non-criminal context:

> We conclude that this court should review the evidence presented to the state court at the 1988 hearing to determine whether any rational trier of fact could have found by a preponderance of the evidence that Levine was mentally ill and dangerous.

(A-15). It should cause little wonder that Ohio, just as was Virginia in *Wright v. West*, is dismayed that the considered judgments of its judiciary were so easily disregarded. Indeed the state courts found that the evidence was clear and convincing. The federal courts found that the evidence did not even satisfy the "preponderance of the evidence."

(C) The Trial Court Had Sufficient Evidence To Find Present Mental Illness Under Ohio Law.

Judge Angelotta, the finder of fact, was presented with credible evidence that Levine was mentally ill. Indeed, Judge Angelotta was in a unique position to evaluate this evidence. Not only had he been the trial judge at Levine's original criminal trial, but also, with the exception of the first two hearings, he had heard all of Levine's recommitment hearings. Judge Angelotta had before him all of the evidence of the original criminal trial plus that of all of the

recommitment hearings. He thus considered Levine's lengthy history of mental illness as well as testimony that his psychosis was incurable. Levine's own expert in his 1979 criminal trial testified at a subsequent recommitment hearing as to the incurability of Levine's disease.

The federal courts appeared unpersuaded by this testimony because it was given close to the time of the 1979 trial and there was more recent testimony that Levine was not then exhibiting overt symptoms of mental illness and/or that his mental illness was in remission. Yet, in doing so, the federal courts discounted a specific credibility finding by the state court trier of fact:

> I find that the perhaps well meaning doctoral diagnosis of remission and recommendation of conditional release to be in error. Or, stated in a more legal sense, the testimony not to be credible.

(A-85). Judge Angelotta had heard testimony that Levine might exhibit remission of symptoms in a structured, institutionalized setting, but that he would relapse outside of that structured setting. From past history Judge Angelotta could be skeptical of claims of Levine's "cure." The killing of Mr. Kravitz occurred only one week after Dr. Levendula's "therapeutic triumph." In 1982 some doctors began indicating that Levine was then cured, only to later discover that at an earlier time Levine had been writing notes threatening to kill his ex-wife. (A-78). One doctor testified that Levine's statements "someone will pay," made in response to transfers to more restrictive confinement, were normal expressions of anger over what Levine viewed as unfair transfers and were limited to threats of legal, civil retribution. (A-70). The trial court obviously did not have to credit that speculation.

The court below misperceived the State's position regarding evidence of past behavior. The court believed the State was arguing for an irrebuttable presumption under which Levine could never be released. (A-11). That is simply not the case. The State does not contend that there could never be a set of facts or circumstances that would permit

a state court trier of fact to find Levine no longer mentally ill subject to hospitalization by court order. But here there was a specific finding that Levine was mentally ill and, as found by the state court of appeals, such a finding was not an abuse of discretion. (A-76).

Most of the experts who testified on Levine's behalf never refuted Levine's diagnosis of psychosis or that such a mental illness is incurable. They simply testified as to their belief he should be released because he was not then exhibiting overt symptoms. It was not irrational for the trial court to weigh this testimony against the result of the last time that Levine was in an unstructured setting.

Judge Angelotta had been told by the experts that past history is relevant, some saying that it is crucial. Judge Angelotta relied on a thirteen year history characterized by long periods of relatively normal functioning, but punctuated by sudden outbursts of violence and destruction. Levine's history included killing a man, which he likened to shooting at a side of beef or rabid dog, feeling no worse than if he had shot an ant. That history also included death threats, before and after his commitment.

Judge Angelotta also relied on testimony that in unstructured situations (outside the structured setting of a hospital), Levine is prone to violence and destruction, that he becomes overwhelmed when emotions are stimulated, and that primitive aggression most accurately describes his response and actions. (A-83).

(D) Under Ohio Law A Conditional Release Does Not Connote The Absence Of Mental Illness.

The Sixth Circuit, in affirming the grant of a writ releasing Levine, adopted — with slight modification — the conditions imposed on the release by the district court. (A-24). The court below misread Ohio's argument with respect to such conditions. The court believed Ohio was arguing that the imposition of such conditions was inconsistent with the

court's simultaneous finding that the state court order of commitment was insufficient. However, the State was not challenging the authority of the federal court to fashion relief once it found relief should be granted. *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987). Rather, the State cited to the conditions merely to explain the testimony of Dr. Magdi Rizk.

The significance of the conditions lies in the fact that they were proposed by Dr. Rizk, the psychiatrist to whom the trial court referred Levine for evaluation in 1988. Under Ohio law a conditional release is defined as a commitment. *State v. Johnson* (1987) 32 Ohio St. 3d 109, 111 n.1, 512 N.E.2d 652. A conditional release, as opposed to an unconditional release, cannot be ordered unless the individual is still mentally ill and dangerous. In recommending the conditions imposed by the courts below, Dr. Rizk was in essence recommending a conditional release under Ohio law. Thus, contrary to the court below, the testimony of Dr. Rizk establishes that Levine was not then showing symptoms of mental illness, not that Levine was cured. As such, Dr. Rizk's testimony does not provide a basis for rejecting Judge Angelotta's application of state law.

II. THE COURT SHOULD GRANT CERTIORARI TO HOLD THAT A STATE COURT FINDING OF "MENTAL ILLNESS" IS A FINDING OF FACT WHICH IS ENTITLED TO A PRESUMPTION OF CORRECTNESS.

The state trial court found present mental illness as a matter of fact. The court below found that there was no evidence of mental illness at all. (A-13). The court below concluded that the question of mental illness is a mixed question of law and fact (A-12) and thus complete *de novo* review was required. Mental illness is a question of fact which is entitled to a presumption of correctness. 28 U.S.C. §2254(d).

In *Maggio v. Fulford*, 462 U.S. 111 (1983), this Court had "not the slightest hesitation" in applying the presumption of correctness contained in 28 U.S.C. §2254(d) to a state trial court's finding that a defendant was competent to stand

trial. *Id.* at 117. Citing *Maggio*, the Court in *Miller v. Fenton*, 474 U.S. 104 (1985), characterized as "well established" the principle that an inquiry into state of mind is a question of fact. *Id.* at 113.

Further, this Court's cases dealing specifically with psychiatric commitment of individuals analyze the issues of mental illness and dangerousness as factual issues:

> Whether an individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists.

Addington v. Texas, 441 U.S. 418, 429 (1979) (emphasis omitted), quoted in *Vitek v. Jones*, 445 U.S. 480, 495 (1980). In *Jones v. United States*, 463 U.S. 354 (1983), the Court held that a verdict of not guilty by reason of insanity establishes two *facts*: namely, that the defendant committed a criminal act (i.e., that he is dangerous) and that he committed the act because of mental illness. *Id.* at 363-5.

Sumner v. Mata, 449 U.S. 539, 551 (1981), *reaff'd* 455 U.S. 591 (1982), requires a habeas court granting a writ to state in its decision why it rejects state court findings. Here, both the state trial court and the state appellate court found that specific expert testimony presented in earlier commitment proceedings, that Levine was incurably and chronically mentally ill and dangerous, was more credible than 1988 expert testimony that he was not. Nowhere in their decisions do the district court or the Sixth Circuit comply with the mandate of *Sumner* and explain why the state courts could not find earlier expert testimony — testimony given credence and relied upon by the district court itself in upholding an earlier commitment order — more credible than later testimony.

The court below stated that it was not rejecting any findings of fact by the state courts. But it could make this statement only by redefining what is a finding of fact as opposed to

a mixed question of law or fact. Moreover, even in using its own standard, the court mischaracterized Judge Angelotta's finding. Variously, the court indicated that Judge Angelotta gave weight to lay testimony concerning past heinous acts over current medical testimony (A-11), failed to make a true credibility finding (A-13), and substituted his own personal predilections as to psychiatry over the 1988 expert opinions. (A-13). None of these characterizations was warranted. As opposed to the court below, Judge Angelotta did not limit his consideration to only the 1988 medical evidence. Instead, he considered "all of the evidence." *Jackson* requires that "all of the evidence" be considered in a light most favorable to the state, 443 U.S. at 319; *See also Marshall v. Lonberger,* 459 U.S. 422, 434-5 (1983). The Court should grant certiorari, if for no other reason than to reaffirm the presumption of correctness of state court findings of fact and to instruct federal habeas courts that unexplained substitution of judgment is not permissible.

III. THE COURT SHOULD GRANT CERTIORARI TO UPHOLD THE ENFORCEMENT OF A STATE PROCEDURAL DEFAULT RULE.

(A) A State Court's Reliance On A Procedural Default As One Ground For Denial Of A Claim Is Sufficient To Bar Federal Habeas Review.

The state court of appeals specifically found that Levine's federal due process claim had been waived:

> The defendant, in his second assignment of error, raises various claims challenging the constitutionality of Ohio's statutory commitment scheme as applied in this case. Our review of the record discloses *that the defendant has waived these claims since he failed to raise them with the trial court. State v. 1981 Dodge Ram Van* (1988), 36 Ohio St. 3d 168, 170. Furthermore, this court

> in substance addressed and overruled these claims in the defendant's prior appeal. See *State v. Levine, supra,* slip opinion at 7-9.

(A-79) (emphasis added). The court below agreed that the issue had not been raised in Levine's 1988 recommitment hearing. However, based upon the state court of appeals' brief reference to their ruling in an earlier appeal by Levine, the court below concluded that the state court of appeals did not rely on a state procedural bar, but instead reached the merits of Levine's constitutional claim. (A-17).

This conclusion utterly eviscerates this Court's procedural default jurisprudence, for in *Harris v. Reed,* 489 U.S. 255 (1989), the Court advised the states:

> [A] state court need not fear reaching the merits of a federal claim in an *alternative* holding. By its very definition, the adequate and independent state-ground doctrine requires the federal court to honor a state court holding that is a sufficient basis for the state court's judgment, even when the court also relied on federal law.

Id. at 264 n.10 (citation omitted) (emphasis in original).

Just last term the Court reviewed, in *Sochor v. Florida,* 504 U.S. ___ , 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992), a judgment by the Supreme Court of Florida in which that court used language remarkably similar to that at issue here:

> Sochor's next claim, regarding alleged errors in the penalty jury instructions, likewise must fail. None of the complained of jury instructions were objected to at trial, and, thus, they are not preserved for appeal. *Vaught v. State,* 410 So.2d 147 (Fla. 1982). In any event, Sochor's claims here have no merit.

119 L.Ed.2d at 337-8 (quotations and footnote omitted). This Court concluded that the Florida court's ruling, based on an alternative state ground, was sufficient to bar federal

habeas review. *Id.* The court below not only failed to distinguish *Harris* or *Sochor*, it ignored these decisions entirely. This is an example of the sort of intrusion that the procedural default rule was designed to prevent. *Engle v. Isaac*, 456 U.S. 107, 128-9 (1982).

(B) This Is An Inappropriate Case For Adoption Of An "Actual Sanity" Exception.

The court below added that even if Levine had procedurally defaulted his constitutional claim, the court would excuse the procedural default and reach the claim under the "actual innocence" exception announced in *Murray v. Carrier*, 477 U.S. 478, 496 (1986). (A-18). Excusing the procedural default would be premised, the court stated, on the conclusion that Levine is "actually not mentally ill." *Id.* That premise, as well as the application here of an "actual sanity" exception, is totally at odds with this Court's pronouncements.

First, in *Murray v. Carrier* this Court reserved application of the "actual innocence" exception to the "extraordinary case." 477 U.S. at 495-6; and see *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989). Not every case in which a federal habeas court concludes that there may be a meritorious claim under *Jackson v. Virginia* is an "extraordinary case." *Jackson* provides the constitutional standard for legal innocence, not actual innocence. *See Sawyer v. Whitley*, 505 U.S. ___ , 112 S.Ct. 2514, 120 L.Ed.2d 269, 280 (1992). The court below confused the question of whether the evidence was legally sufficient under *Jackson* with the question under *Murray* of whether Levine is actually mentally ill.

Second, the purpose of the "fundamental miscarriage of justice" exception is to allow federal habeas corpus courts to reach and to remedy constitutional violations which, due to state court procedural default, are beyond remedy in state court. *Murray v. Carrier*, 477 U.S. at 495-6. Application of the exception does not withstand examination where, as here, state law provides for regular, periodic commitment hearings, and Levine may still seek his release. There is no need for

federal intrusion where the petitioner may yet fairly present his constitutional claim to the state courts.

IV. THE COURT SHOULD GRANT CERTIORARI TO PREVENT RELIANCE ON EVIDENCE NEITHER PRESENTED TO NOR CONSIDERED BY THE STATE TRIER OF FACT.

In considering the sufficiency of the evidence supporting the 1988 commitment order, the district court allowed expansion of the record to include 1992 psychiatric reports. The district court specifically relied on the need for such reports. The court stated that:

> [I]t is imperative that this Court's decision be based upon the most up-to-date medical evidence available . . .

(A-29). The Sixth Circuit found that consideration of such evidence was an abuse of discretion, but found that it was harmless error. Despite the clear statement by the district court that the evidence was necessary to reach its conclusion, the court below characterized it as "merely cumulative." Since a sufficiency of the evidence claim involves review of the evidence considered by the trier of fact, consideration of any other evidence inherently raises concerns of prejudice.

Here, prejudice is evident. The supplementary evidence reinforced the district court's belief that the state trial court reached the wrong result.

Moreover, consideration of the evidence in actuality changed the nature of the claim under review. The district court was no longer looking at the sufficiency of the 1988 evidence, and whether commitment in 1988 was proper, but whether commitment in 1992 was proper. A district court should not expand the record beyond the scope of the claim under review, *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986); *Kenney v. Tamayo-Reyes*, 504 U.S ___ , 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992).

Finally, the 1992 reports gave the district court a sanitized and erroneous picture of Levine. Contrary to the glowing conclusion of the May, 1992 reports, subsequent investigation by the Ohio Department of Mental Health disclosed that during and following the time frame covered by the May, 1992 reports, Levine had engaged in incidents of assaultive behavior against fellow patients. The results of the investigation, together with hospital records reflecting these violent incidents, were presented to the district court in a motion for relief from judgment and to the Sixth Circuit before and after argument in a number of motions, including motions for and against stay and bail. Thus, not only did the district court rely heavily on new evidence clearly beyond the scope of habeas review, the new evidence was strongly misleading. If the district court was going to change the scope of the claim, it should at least have given the state courts an opportunity to consider the new evidence or, at a minimum, given the State an opportunity to challenge the evidence. Since the district court did neither, the error was prejudicial.

CONCLUSION

A writ of certiorari should be issued to review the decision of the United States Court of Appeals for the Sixth Circuit to resolve fundamental questions as to the scope of federal habeas corpus review. Alternatively, because the error of the court below is apparent, this Court should summarily reverse.

Respectfully submitted,

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